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IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

1765566 - R8 SDMS

CRYSTAL OIL COMPANY AND CRYSTAL EXPLORATION AND PRODUCTION COMPANY, Plaintiffs,	§	CASE NO. CV95-2115S
vs.	§	JUDGE STAGG
ATLANTIC RICHFIELD COMPANY, Defendant.	§	MAGISTRATE JUDGE PAYNE

MEMORANDUM IN SUPPORT OF STATEMENT OF APPEAL OF ATLANTIC RICHFIELD COMPANY

MAY IT PLEASE THE COURT:

On July 29, 1996, defendant, Atlantic Richfield Company ("ARCO"), filed its Statement of Appeal from the Order of Severance and Referral to Bankruptcy Court (the "Referral Order") and the Memorandum Ruling supporting the Referral Order, both dated July 19, 1996, entered by Magistrate Judge Payne in this action. Contemporaneously with the Referral Order, Magistrate Judge Payne issued an Order of Transfer ("Transfer Order") in this action, from which order ARCO does not appeal.

FACTS

On November 30, 1995, Crystal Oil Company ("Crystal") and its subsidiary, Crystal Exploration and Production Company ("CEPCO"), filed this action for declaratory judgment against ARCO. Among other issues, the plaintiffs' complaint sought a declaration that ARCO's claim against Crystal under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601 et seq. ("CERCLA"), was discharged through Crystal's 1986 Chapter 11 bankruptcy case.

After ARCO filed its motion to transfer this action to the United States District Court for the District of Colorado because of the strong tie to that forum, Crystal reopened its previously-closed 1986 bankruptcy case and moved this Court to refer to the bankruptcy judge the sole issue of whether ARCO's CERCLA claim was discharged in Crystal's 1986 bankruptcy case (the "Bankruptcy Discharge Issue"). ARCO opposed Crystal's motion on grounds that reference of that sole issue should be denied on mandatory grounds under 28 U.S.C. § 157(d) and other reasons. Without addressing ARCO's arguments that this statute precludes the referral of this issue to the bankruptcy judge, the Magistrate Judge severed the Bankruptcy Discharge Issue from the remainder of the action and referred that single issue to the bankruptcy judge.

SUMMARY OF ARGUMENT

The Bankruptcy Discharge Issue raises a difficult question that will necessitate the interpretation of the substantive and conflicting provisions of CERCLA and the Bankruptcy Code. Contrary to Crystal's argument to the Magistrate Judge, the courts have recognized this conflict and applied varying and inconsistent approaches in trying to reconcile these statutes. The conflicting approaches employed by the courts throughout the country, the absence of any clear consensus to a single approach, and the utter absence of any guidance by the Fifth Circuit will necessitate that serious and substantive consideration be given to an attempt to reconcile these competing federal statutes. Under these circumstances, 28 U.S.C. § 157(d) compels that any referral of this issue to the bankruptcy judge be withdrawn to the district court.

The policy considerations relied upon by the Magistrate Judge to support referring this issue to the bankruptcy judge are not as applicable to the district court forum. Accordingly, once the Bankruptcy Discharge Issue is returned to the district court under 28 U.S.C. § 157(d), this Court should scrutinize de novo ARCO's arguments supporting the transfer of venue of the Bankruptcy Discharge Issue to the United States District Court for the District of Colorado. Substantially all material witnesses, documents and other matters relating to such issue are located in the state of Colorado. Moreover, many of the legal and factual issues that are involved in the claims that the Magistrate Judge transferred to the Colorado District Court are also germane to the Bankruptcy Discharge Issue. Upon consideration of the factors relevant to ARCO's change of venue motion as between the only two judicial forums that may permissibly decide the Bankruptcy Discharge Issue, the strong preponderance of factors favors the transfer of that issue to the federal district court in Colorado.

ARGUMENT

1. The Bankruptcy Judge is Prohibited From Deciding the Bankruptcy Discharge Issue.

In pertinent part, 28 U.S.C. § 157(d) provides:

> The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

A district court is required to withdraw the reference from a bankruptcy judge when it is established that (1) the proceeding before the bankruptcy judge involves a substantial and material question of Title 11 and non-Bankruptcy Code federal law, (2) the

non-Bankruptcy Code federal law has more than a de minimis effect on interstate commerce, and (3) the motion for withdrawal was timely filed. Lifemark Hospitals v. Liljeberg Enterp., 161 B.R. 21, 24 (E.D. La. 1993); In re National Gypsum Co., 145 B.R. 539, 541 (N.D. Tex. 1992); see also Sibarium v. NCNB Texas National Bank, 107 B.R. 108, 111 (N.D. Tex. 1989). In the present case, the first criterion is the only one that merits further discussion because the law is clear that CERCLA has more than a de minimis effect on interstate commerce, see In re National Gypsum, 134 B.R. 188, 192 (N.D. Tex. 1991); United States v. Ilco, 48 B.R. 1016, 1021 (N.D. Alabama 1985), and because there is no issue as to the timeliness of the filing of a motion to withdraw.[1]

The question of whether ARCO's CERCLA claim was discharged in 1986 involves a determination of when ARCO is first deemed to have had such a claim. Matter of Chicago, Milwaukee, St. Paul & Pac. Railroad Co., 974 F.2d 775 (7th Cir. 1992) (hereinafter "Matter of Chicago"). If ARCO is deemed to have had such a claim on or before December 31, 1986, then ARCO's CERCLA claim may be discharged in Crystal's Chapter 11 case. However, if the CERCLA claim is deemed to have arisen after such date, then ARCO may assert a CERCLA claim

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[1] Because Crystal chose not to reopen the bankruptcy case until after it had filed this action in district court, the Bankruptcy Discharge Issue was not automatically referred to the bankruptcy judge under Local Rule 22.01W. Technically, ARCO was therefore not in a position to request this Court to "withdraw" reference of the Bankruptcy Discharge Issue until after the reference was first made. In order to timely urge the withdrawal of reference, therefore, ARCO will promptly file its Motion to Withdraw Reference of Bankruptcy Discharge Issue. Thus, whether on appeal from the Referral Order or by ARCO's Motion to Withdraw Reference of Bankruptcy Discharge Issue, ARCO has timely raised this issue with this Court.

against Crystal notwithstanding Crystal's 1986 discharge in bankruptcy.

The determination of what constitutes the appropriate standard for determining when a CERCLA claim arises for purposes of bankruptcy is a question of law. Id. at 780. Furthermore, the question of when a CERCLA claim arises is one that requires the consideration of the conflicting goals and provisions of CERCLA and the Bankruptcy Code.[2] As the Ninth Circuit Court of Appeal observed in In re Jensen, 995 F.2d. 925 (9th Cir. 1993): "The intersection of environmental cleanup laws and federal bankruptcy statutes is somewhat messy." The tension between the statutes emanates from conflicting goals. The Seventh Circuit captured this conflict in its opinion in Matter of Chicago, supra:

> Bankruptcy laws serve an important purpose of equitably distributing an insolvent debtor's funds in hope of maximizing the creditor's interests in receiving payment and the debtor's interest in a fresh start . . . Moreover, bankruptcy's goal of giving debtors a fresh start would be frustrated if creditors who failed to file timely claims tried to bring claims against a reorganized company after the close of bankruptcy. For this reason, the timely filing of claims is vital to the purposes underlying bankruptcy.
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> * * *
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> Just as important interests underlie the bankruptcy laws, laudable goals also underlie CERCLA - namely, protecting this nation's environment by distributing the costs associated with cleaning up sites containing hazardous

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[2] Even Crystal recognizes the importance of CERCLA to the Bankruptcy Discharge Issue's resolution by its reliance on CERCLA as the primary basis for federal question jurisdiction in this action. Paragraph 1 of Crystal's Complaint states:

> This action arises under federal question jurisdiction, 28 U.S.C. § 1331, and requires application of the provisions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq. (emphasis added).

> materials. In order to encourage cleanup and to distribute the costs of cleanup, CERCLA's strict liability provisions make a broad category of parties responsible for cleanup costs. See 42 U.S.C. §§ 9607(a), 9601(21). Prematurely cutting off a party's ability to recover for CERCLA cleanup costs could impede CERCLA's cost-distribution scheme. And for this reason, the Bankruptcy Court's interest in having all claims before it as early as possible sometimes conflicts with the cleanup process envisioned in CERCLA.

Id. at 779.

From these conflicting goals and policies, courts have employed widely varying standards for determining when a CERCLA claim arises for purposes of bankruptcy. Id.; In re Jensen, supra. For instance, the Second Circuit adopted the rule that a claim arises for purposes of bankruptcy discharge upon the actual or threatened release of hazardous waste by the debtor, regardless of whether such release is known by the creditor. See In re Chateaugay Corp., 944 F.2d 997, 1005 (2nd Cir. 1991). Conversely, the Seventh Circuit balances the competing policies of the statutes very differently in holding that a CERCLA claim arises for bankruptcy purposes

> when a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance which this potential claimant knows will lead to CERCLA response costs, and when this potential claimant has, in fact, conducted tests with regard to this contamination problem . . ."

Matter of Chicago, 974 F.2d at 786 (emphasis added). Starkly different still is the "relationship" test employed by the court in In re Edge, 60 B.R. 690 (Bankr. N.D. Tenn. 1986), which approach establishes the date of a bankruptcy claim "at the earliest point in the relationship between the debtor and the creditor."

Conversely, in United States v. Union Scrap & Metal, 123 B.R. 831, 838 (D. Minn. 1990), the court held that a CERCLA claim did

not arise until each element of the CERCLA claim was established, including the incurrence of response costs. Finally, the Ninth Circuit departed from all of those approaches by adopting a "fair contemplation" test, which deems only those CERCLA claims to exist for bankruptcy purposes which arise from a debtor's pre-petition conduct resulting in a release or threat of release that could have been "fairly contemplated" by the parties. In re Jensen, supra. That court set forth indicia of fair contemplation, such as knowledge by the parties of a site in which a potentially responsible party ("PRP") may be liable, National Priorities Listing, notification by the Environmental Protection Agency of PRP liability, commencement of investigation and cleanup activities and incurrence of response costs. Id. at 930.

Although the Supreme Court has urged the lower courts to try to reconcile the competing purposes behind CERCLA and the Bankruptcy Code, Id. at 928; Midlantic National Bank v. New Jersey Dept. of Environmental Protection, 476 U.S. 494, 106 S.Ct. 755, 88 L.Ed.2d. 859 (1986), as the foregoing cases show, there is no consensus among the courts on the question.

As held by the court in In re National Gypsum Company under similar circumstances, "any exploration of these conflicts [between CERCLA and the Bankruptcy Code] implicates the category of cases that require consideration of both title 11 and CERCLA." 134 B.R. at 193. See also In re Hemingway Transport, Inc., 108 B.R. 378 (Bankr. D. Mass. 1989); Matter of LAJET, Inc., 1995 W.L. 72428 (E.D. La. 1995) ("the proceeding will require significant interpretation and substantial material consideration of CERCLA. Since CERCLA has been held to 'affect interstate commerce' for

these purposes, see United States v. ILCO, Inc., 48 B.R. 1016, 1021 (N.D. Alabama), withdrawal of reference is mandatory.") Under these circumstances, this Court is required to decline reference of this issue to the bankruptcy judge. This important issue was not addressed by the Magistrate Judge in his Memorandum Ruling and this omission calls for this Court's careful consideration of it on appeal.

2. This Court Should Consider de novo ARCO's Grounds Supporting Transfer to Colorado and Should Transfer the Bankruptcy Discharge Issue to Colorado.

The Magistrate Judge ruled that reasons of convenience and public interest compel the transfer of all non-bankruptcy issues in this action to the Colorado District Court. However, for reasons "in the interests of justice" involving the local bankruptcy court, he held that the Bankruptcy Discharge Issue will remain before the local bankruptcy judge. Memorandum Ruling at 13-14. Specifically, the Magistrate Judge concluded that, although the Bankruptcy Discharge Issue may require the consideration of predominantly Colorado-based facts and witnesses, those considerations are outweighed in favor of the bankruptcy judge resolving the Bankruptcy Discharge Issue because (1) the bankruptcy judge is now considering whether other environmental-related claims against Crystal were also discharged in 1986 and (2) the law to be applied as the Bankruptcy Discharge Issue "should be molded by the bankruptcy courts." Memorandum Ruling at 11.

Once it is recognized that 28 U.S.C. § 157(d) compels this Court to withdraw the reference of this issue from the bankruptcy judge, however, the foundation underlying the Magistrate Judge's conclusion is undermined. Section 157(d) eliminates the bankruptcy

court as an available forum to decide the Bankruptcy Discharge Issue; the only permissible forums are this Court and the United States District Court for the District of Colorado. Neither consideration "in the interests of justice" that persuaded the Magistrate Judge in favor of the bankruptcy judge recommends this Court over the federal district court in Colorado. Unlike the bankruptcy judge, this Court has no more experience or expertise in legal issues raised by the Bankruptcy Discharge Issue than does this Court's counterpart in Colorado.

Moreover, once this Court recognizes the need for mandatory withdrawal of the reference, the Magistrate Judge's rationale supporting the Transfer Order becomes even more applicable to the Bankruptcy Discharge Issue. Like all other issues in this action, which have now been transferred to Colorado by the Transfer Order, the Bankruptcy Discharge Issue will require the long and careful examination of many witnesses, facts and documents that are located in or occurred in the state of Colorado. See ARCO Memoranda in support of its Motion to Transfer and the Affidavit of Lary D. Milner, which are adopted herein by reference. By adopting the Magistrate Judge's Order, the Court runs the risk of inconsistent findings on factual issues that are common both to the Bankruptcy Discharge Issue and the contract issue that has been transferred to Colorado.

CONCLUSION

The Referral Order issued by Magistrate Judge Payne on July 19, 1996 is clearly erroneous and contrary to law. It should be set aside, and the Bankruptcy Discharge Issue should be

transferred, along with the other issues in the case, to the United States District Court for the District of Colorado.

Shreveport, Louisiana, this 2nd day of August, 1996.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Memorandum in Support of Statement of Appeal of Atlantic Richfield Company has been served upon plaintiffs' counsel of record, Osborne J. Dykes, III, Fulbright & Jaworski, 1301 McKinney, Suite 5100, Houston, Texas 77010-3095, and Albert M. Hand, Jr., Cook, Yancey, King & Galloway, P.O. Box 22260, Shreveport, Louisiana 71120-2260, by depositing a copy of same in the U.S. Mail, properly addressed, with adequate postage affixed thereto.

Shreveport, Louisiana, this 2nd day of August, 1996.

OF COUNSEL